Testimony of Dick Thornburgh
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before the Subcommittee on Crime, Terrorism & Homeland Security
of the House Committee on the Judiciary
regarding
"White Collar Enforcement (Part l): Attorney-Client Privilege and Corporate Waivers."
Tuesday, March 7, 2006

Good morning, Chairman Coble and members of the Subcommittee, and thank you for the invitation to speak to you today about the grave dangers posed to the attorney-client privilege and work product doctrine by current governmental policies and practices. At the outset, let me commend you for being the first Congressional body to convene a hearing on this very worrisome situation. The attorney-client privilege is a fundamental element of the American system of justice, and I fear that we have all been too slow in recognizing how seriously the privilege has been undermined in the past several years by government actions. Your focus on this issue today is vitally needed and much appreciated.

The attorney-client privilege is the oldest of the "evidentiary privileges," originating in the common law of England in the 1500s.[1] Although the privilege shields from disclosure evidence that might otherwise be admissible, courts have found that this potential loss of evidence is outweighed by the benefits to the immediate client, who receives better advice, and society as a whole, which obtains the benefits of voluntary legal compliance. These ideas have been embraced time and time again by the courts -- in the words of the Supreme Court, the privilege encourages "full and frank communication between attorneys and their clients and thereby promote[s] broader public interest in the observance of law and administration of

[1] *See Berd v. Lovelace*, 21 Eng. Rep. 33 (Ch. 1577); *Dennis v. Codrington*, 21 Eng. Rep. 53 (Ch. 1580) (finding "A counselor not to be examined of any matter, wherein he hath been of counsel").

justice."[2] The attorney-client privilege is thus a core element in a law-abiding society and a well-ordered commercial world.

And yet the previously solid protection that attorney-client communications have enjoyed has been profoundly shaken by a trend in law enforcement for the government to demand a waiver of a corporation's privilege as a precondition for granting the benefits of "cooperation" that might prevent indictment, or diminish punishment. These pressures emanate chiefly from the Department of Justice ("DOJ") and the Securities and Exchange Commission ("SEC"). Beginning with the 1999 "Holder Memorandum," and as more forcefully stated in the 2003 "Thompson Memorandum," DOJ has made clear its policy that waiver of the attorney-client (and work product) protections is an important element in determining whether a corporation may get favorable treatment for cooperation.[3] The SEC, in a public "report" issued at the conclusion of an investigation, outlined a similar policy.[4] Finally, the U.S. Sentencing Commission in 2004 amended the commentary to its Sentencing Guidelines so that waiver of privilege became a significant factor in determining whether an organization has engaged in the timely and thorough "cooperation" necessary for obtaining leniency.[5] Following the federal lead, state law

[2] *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

[3] *See* Memorandum from Deputy Attorney General Larry D. Thompson to Heads of Department Components and United States Attorneys, *Re: Principles of Federal Prosecution of Business Organizations* (January 20, 2003); available at www.usdoj.gov/dag/cftf/business_organizations.pdf. The DOJ recently re-affirmed that the Thompson Memorandum remains the Department's official policy. *See* Memorandum from Acting Deputy Attorney Robert D. McCallum, Jr. to Heads of Department Components and United States Attorneys, *Re: Waiver of Corporate Attorney-Client and Work Product Protection* (October 21, 2005) (the "McCallum Memorandum"); available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00163.htm.

[4] *See Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions*, SEC Release Nos. 34-44969 and AAER-1470 (Oct. 23, 2001) (the "Seaboard Report"); available at http://www.sec.gov/litigation/investreport/34-44969.htm.

[5] United States Sentencing Commission, Guidelines Manual, § 8C2.5(g), comment 12 (Nov. 2004).

enforcement officials are beginning to demand broad privilege waivers, as are self-regulatory organizations and the auditing profession.[6]

While the tone of these documents may be moderate, and officials representing these entities stress their intent to implement them in reasonable ways, it has by now become abundantly clear that, in actual practice, these policies pose overwhelming temptations to prosecutors seeking to save time and resources and to target organizations desperate to save their very existence. And each waiver has a "ripple effect" that creates more demands for greater disclosures, both in individual cases, and as a matter of practice. Once a corporation discloses a certain amount of information, then the bar is raised for the next situation, and each subsequent corporation will need to provide more information to be deemed cooperative.

The result is documented in a survey released just this week to which over 1,400 in-house and outside counsel responded, in which almost 75% of both groups agreed – almost 40% agreeing strongly -- that a "'culture of waiver' has evolved in which governmental agencies believe it is reasonable and appropriate for them to expect a company under investigation to broadly waive attorney-client privilege or work product protections." I practice law at a major firm with a significant white collar criminal defense practice. My partners generally report that they now encounter waiver requests in virtually every organizational criminal investigation in which they are involved. In their experience, waiver has become a standard expectation of

[6] For example, in late 2005 the New York Stock Exchange issued a memorandum detailing the degree of "required" or "extraordinary" cooperation Members and Member Firms could and should engage in with the Exchange. *See* NYSE Information Memorandum No. 05-65, Cooperation, dated September 14, 2005. Exchange Members engaging in "extraordinary" cooperation, including waiver of the attorney-client privilege, are able to reduce prospective fines and penalties levied by the Exchange. *See, e.g.,* NYSE News Release, *NYSE Regulation Announces Settlements with 20 Firms for Systemic Operational Failures and Supervisory Violations* (January 31, 2006) (noting that Goldman, Sachs & Co. had been credited with "extraordinary" cooperation by self-reporting violations, and indicating it received the lowest of three possible fine amounts), available at http://www.nyse.com/Frameset.html?displayPage=/press/1138361407523.html.

federal prosecutors. Others with whom I've spoken in the white collar defense bar tell me the same thing.

I am prepared to concede that the significance of these developments took some time to penetrate beyond the Beltway and the relatively small community of white collar defense lawyers. It is clear, however, that as the legal profession has become aware of the problem, it has resulted in a strong and impassioned defense of the attorney-client privilege and work product protection. This issue was the hottest topic of last summer's Annual Meeting of the American Bar Association ("ABA"), and at its conclusion, the ABA House of Delegates unanimously passed a resolution that "strongly supports the preservation of the attorney-client privilege" and "opposes policies, practices and procedures of government bodies that have the effect of eroding the attorney-client privilege. . . ."[7]

I was one of nine former Attorneys General, Deputy Attorneys General and Solicitors General, from both Republican and Democratic administrations, who signed a letter to the Sentencing Commission last summer urging it to reconsider its recent amendment regarding waiver. It is never a simple matter to enlist such endorsements, particularly in the summer and on short notice. And yet it was not difficult at all to secure those nine signatures, because we all feel so strongly about the fundamental role the attorney-client privilege and work product protections play in our system of justice.

We feel just as strongly that the other governmental policies and practices outlined above seriously undermine those protections. As you know, I served as a federal prosecutor for many

[7] This resolution was initially drafted by an ABA Task Force on the Attorney-Client Privilege, which held public hearings on the issues raised by recent government practices. A report detailing the Task Force's work is available at http://www.abanet.org/buslaw/attorneyclient/materials/hod/report.pdf. ABA members also heard extensive discussion of the issues at these well attended presentations. *See* Conference Report, ABA Annual Meeting, Vol. 21, No. 16 (August 10, 2005).

years, and I supervised other federal prosecutors in my capacities as U.S. Attorney, Assistant Attorney General in charge of the Criminal Division and Attorney General. Throughout those years, requests to organizations we were investigating to hand over privileged information never came to my attention. Clearly, in order to be deemed cooperative, an organization under investigation must provide the government with all relevant factual information and documents in its possession, and it should assist the government by explaining the relevant facts and identifying individuals with knowledge of them. But in doing so, it should not have to reveal privileged communications or attorney work product. That limitation is necessary to maintain the primacy of these protections in our system of justice. It is a fair limitation on prosecutors, who have extraordinary powers to gather information for themselves. This balance is one I found workable in my years of federal service, and it should be restored.

I was pleased to see the Sentencing Commission earlier this year request comment on whether it should delete or amend the commentary sentence regarding waiver. In testimony last fall I urged it to provide affirmatively that waiver should not a factor in assessing cooperation. I understand that the ABA will shortly approach DOJ with a request that the Thompson memorandum be revised in similar fashion. These are promising developments.

Mr. Chairman, I thank you again for beginning the much-needed process of Congressional oversight of the privilege waiver crisis. This is not an issue that Washington lobby groups have orchestrated, but it is one that likely will take Congressional attention to resolve.

Thank you, and I look forward to your questions.